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CITATIONS

Cases:

Fairmont Coal Co. vs. Jones & Adams Co., 134 F. 711.

The Gulfport, 250 F. 577.

Perry vs. U. S., 294 U. S. 330.

Orient Mutual vs. Wright, 1 Wall. 456.

Clark vs. U. S., 95 U. S. 539.

IN THE

SUPREME COURT OF THE UNITED STATES

No. .....

ALGERNON BLAIR, *Petitioner*

vs.

UNITED STATES OF AMERICA, *et al*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT.

Algernon Blair, the petitioner, prays that a writ of certiorari issue to review the judgment of the Circuit Court of Appeals for the Fifth Circuit rendered in the above case on November 7, 1947, petition for rehearing of which was denied on December 8, 1947.

OPINION BELOW.

The opinion of the Circuit Court of Appeals is reported in Blair vs. United States, 164 F. 2nd, 115. The opinion of the District Court is reported in 66 Fed. Supp. 405.

JURISDICTION.

The jurisdiction of this court is invoked under the provisions of the Act of March 3, 1891, as amended as codified in 28 U. S. C. A. 347, and any other applicable statute or rule.

QUESTION PRESENTED.

The question presented is whether, under the standard form of Government contract, a contractor employed to take apart a number of Government owned houses of the prefabricated type, transport the parts to another city, and there put them together again, is an insurer of their safety so as to be required to repair damage caused by act of God.

CONTRACT PROVISIONS.

The contract provisions are set out in the appendix to this petition.

STATEMENT.

Petitioner, a contractor of Montgomery, Alabama, was employed by the Public Housing Authority of the United States to take apart a number of Government owned houses of the prefabricatel type located at Grenada, Mississippi, transport the parts to Key West, Florida, and there put them together again ready for occupancy. Although there was some incidental work, such as site preparation, furnishing additional utility equipment, and the like, the contract was essentially one of moving Government property from one location to another.

After the houses had been moved and put together again at Key West and the contract was about 97.1% complete, a hurricane struck Key West, raged two days, and damaged the houses without the contractor having been negligent in any way. The Contracting Officer required

the contractor to repair the damage at his own expense on the ground that under the terms of the contract he was an insurer of the safety of the Government property even as against an act of God. On appeal the head of the department took a similar position.

After exhausting his remedies under the contract, petitioner brought this action in the District Court of his residence under the Tucker Act for his expenses in making the repairs.

The District Court held that the contractor was not an insurer of the Government property and that his claim was meritorious, but, on other grounds (which were held by the Circuit Court of Appeals to be without merit and which will not be discussed here) rendered judgment for the defendant.

SPECIFICATION OF ERROR TO BE URGED.

The Circuit Court of Appeals erred in holding that the contract imposed on the contractor responsibility as an insurer of the Government's property and in affirming the judgment of the Circuit Court.

REASONS FOR GRANTING THE WRIT.

The nature and extent of the responsibility imposed under the standard form of contract to move Government property is sufficiently important to warrant the determination of this Court.

When Government property is turned over to a contractor and services are to be performed with reference to that property and it is to be returned to the Govenment in the same or altered form, the relationship created is that of bailor and bailee. Unless a higher degree of responsibility is assumed by the bailee, the extent of his responsibility is the duty to use reasonable care in the

protection of the property. The question of whether the terms of the Government form of contract make the bailee an insurer is important and should be decided by this Court. This importance is emphasized by the fact that there are now, and undoubtedly will be in the future, many similar contracts in force.

Under the holding of the Circuit Court, contractors who bid for work or service to or on Government property, possession of which is to be turned over to the contractor, will add to their bid an additional amount to pay for their increased risk as insurers against fire, windstorm and acts of God and this will increase the cost to the Government.

The holding of the Circuit Court of Appeals for the Fifth Circuit is contrary in principle to the holding of the Circuit Court of Appeals of the Seventh Circuit (*Fairmont Coal Company vs. Jones & Adams Company,* 134 F. 711—1905). It is contrary to its own holding in *The Gulfport,* 250 Fed. 577 (1918). The law is thus left in a state of uncertainty.

It is basic law that:

"When the United States, with constitutional authority, makes contracts, it has rights and incurs responsibilities similar to those of individuals who are parties to such instruments." *Perry vs. U. S.,* 294 U. S. 330, 79 Fed. 913.

It is also basic that:

"Where the language of an instrument requires construction, it shall be taken most strongly against the party making the instrument." Syllabus in *Orient Mutual vs. Wright,* 1 Wall. 456, 17 L. ed. 505.

The contract here was prepared by the Government.

The Court below recognized this as a contract of bailment[1] and that in the absence of express agreement otherwise, a bailee is responsible only for ordinary care of the property bailed.[2] This is the rule as stated by this court.

> "A bailee for hire is only responsible for ordinary diligence and liable for ordinary negligence in the care of the property bailed. This is not only the common law, but the general law on the subject." *Clark vs. U. S.*, 95 U. S., 539, 24 L. ed. 518.

The contract clause taken by the court below as imposing upon the bailee the extraordinary responsibility of an insured against damage caused by act of God is Division DTH-1:

> "The Contractor shall be responsible for all buildings, equipment and appurtenances to be moved and reerected, including any loss, breakage, or other damage thereto from date of Notice to Proceed until completion and acceptance of the project." (Opinion p. 5).

The question is whether this clause was intended to *increase* the bailee's responsibility from that of ordinary care to that of an insurer of the Government property against an act of God or whether it was intended to *fix the time* when the bailee's ordinary responsibility would begin and end.

This clause says nothing about the bailee being responsible as an insurer nor that he shall be responsible for damage to the Government property caused by act of God. These words are not used. To construe the clause to increase his responsibility to that of an insurer re-

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[1] "The contract before us and its terms and conditions meet all the requirements of a bailment." Opinion p. 4.

[2] "Under the ordinary bailment, appellant would not be responsible for the damage done by the hurricane, but he could by special provision in the contract enlarge his resonsibility to the extent of securing the appellee against that or any other loss." Opinion p. 4.

sponsible for damage done by act of God would be to read into the clause words that are not there.

The law imposes upon the bailee responsibility for damage when it is caused by his neglect and the purpose and intention of the clause was not to increase that responsibility but to fix the *time* when his responsibility would begin and end. Otherwise there might be some question as to the period of his responsibility and accordingly the period of time is fixed as extending from the "date of Notice to Proceed" until the "completion and acceptance of the project."

If it was the intention to make the bailee liable as an insurer, more apt words than those used were available to describe and specify such an unusual and extraordinary responsibility. The use of the word "responsible" is more consistent with the usual and ordinary responsibility of a bailee liable only for negligence than with the idea that this bailee was to be liable irrespective of negligence to the extent of an insurer and liable even for damage done by act of God.

The "contract," of which clause DTH-1 is a part, is a set of approximately 175 pages called "Contract Documents." Near the front is the part called "contract" of 22 numbered articles, of which Article 9 (a) and 9 (b) are shown in the appendix of this petition. The clause in question is not a part of the "contract." Further on is a section of 20 pages of "General Conditions," of which Section 30 is entitled "Insurance." The clause in question is not a part of that section. The clause is found near the back part of a set of nineteen "divisions" of specifications called "General Scope" in a division DTH-1 entitled "Removal of Equipment and Appurtenances."

Of the six sections of this division, five deal with such matters as removal and storage of the household equipment

such as kitchen tables, curtain rods, cook stoves, coal boxes, tooth brush holders, and the like, protection of shrubbery from damage due to operations under the contract (not act of God), inventory of pre-existing defects and shortages, and an option in the contractor to remove or re-erect porch steps. One of the sections is Section 3, which is the clause in question.

It is unlikely that if the author of the contract documents had intended for the contract to make the contractor an insurer of the Government property that he would have placed such an important clause in such an obscure place and under a division with a title indicating matters wholly unrelated to the nature and extent of the contractor's general contractual responsibility. The clause would have been in the "contract" part where the other articles dealing with the contractor's responsibility are located, such as Article 9 (a) and 9 (b) or at least in the "insurance" part of "General Conditions" but certainly not alongside such relatively inconsequential matters as the removal and storage of cook stoves, coal boxes, curtain rods, and tooth brush holders.

In order that the "Contract Documents" may be available for convenient inspection, it has been sent to the Clerk of this Court. The obscure clause has been flagged with a tab pasted to the side of the page as otherwise it would be difficult to find.

Not only, therefore, is the language of the clause not susceptible to the meaning given it by the court below but its place and context in the "Contract Documents" is inconsistent with its having been intended to make the contractor an insurer.

That this section (DTH-1 Sec. 3) refers to the *time* when the responsibility of the bailee begins and ends rather than to an increase in the nature of the contractor's

responsibility was held in two cases closely similar in principle.

In *Fairmont Coal Company vs. Jones & Adams Company*, 134 Fed. 711, CCA 7, 1905, the plaintiff contracted with the defendant, a lessee of a coal dock, that the defendant should act as bailee and agent for the plaintiff in receiving, reshipping, selling and storing coal products by the plaintiff. The contract provided that the plaintiff should remain the owner of the coal until sold and that the plaintiff was to insure all coal and "deliver the same alongside" the defendant's dock, the defendant thereupon to be responsible for all coal after such delivery. The dock collapsed and the coal was lost. The plaintiff contended that the defendant had agreed to be responsible for the loss without proof of fault. The District Court held that in view of the other provisions of the contract the stipulation that the defendant should "be responsible for all coal after such delivery" did not evidence an intention to enlarge the defendant's common law liability to that of an insurer but that properly construed the clause only marked the time when the bailee's common law liability should commence. It was further held that the stipulation was merely declaratory of a liability which the law would impose upon the facts and that its insertion in the contractor neither increased nor changed the usual obligation of a bailee.

The other case is *The Gulfport*, 250 Fed. 577, CCA 5, 1918, in which this construction was followed. In this case a hurricane blew out a dry dock and the bailee of a tug lost possession of it and was put to expense on account of retrieving the tug. It was held that the bailee's agreement to be responsible for the tug while in possession of it did not make it an insurer and that the bailor must bear the expense incident to retrieving the tug.

The District Court was in accord with the plaintiff's contention in this respect and held that (R. 121): "this repair work was not contemplated by the parties" and it "was not intended by either of the parties to make the plaintiff an insurer of the property to any greater extent than loss, breakage or damage caused by negligence on the part of the plaintiff."

If the language used in this clause is susceptible of two meanings, one of which would increase the bailee's responsibility, and the other of which would *fix the time* when the responsibility begins and ends, the rule of construction against the party who wrote the contract would apply to require that the clause be construed not to apply to increase the responsibility but to fix the time and period of the responsibility.

The bailee's responsibility should not be increased to the high degree of that of an insurer without express words to that effect. They are absent here.

The court below based its conclusion that the clause made the contractor an insurer even as to damage caused by act of God on two other clauses of the contract.

One of these was Article 9 (b), (see appendix) of the contract exempting the contractor from liability for losses caused by war, revolution, etc., but not mentioning anything about acts of God, and the court reasoned that as acts of God were not expressly included, they should by inference be excluded, and that "to read into the exceptions acts of God would be to add language not used by the parties." (Opinion p. 5).

But it is not a matter of reading *in* an *exception*. What the Court below did was read in an increased degree of responsibility. If there had been a clause to the effect that the contractor was an insurer, and if the list of exceptions did not include acts of God, they would naturally remain

in. But there was no clause making the contractor an insurer and the fact that the list of exceptions to his general responsibility omits acts of God should not be held to require writing into the contract something which is not there. The bailee's responsibility should not be thus increased by *inference*. Especially should this not be so in a contract written by the bailor.

Curiously enough, the court below fortifies its conclusion by calling attention to the fact that Article 9 (a) (see appendix) dealing with "delays" provides that the contractor shall *not* be chargeable with *delay* caused by "causes beyond the control and without the fault or negligence of the contractor, including but not limited to acts of God, or the public enemy" and reasons that, therefore, he should be liable for *loss*. But it would seem more logical to conclude that if by the contract the contractor was *not* to be held responsible for *delay* caused by act of God that, therefore, he should *not* be held responsible for *loss* caused by act of God.

CONCLUSION.

There are no words in the contract by which the contractor undertook to be an insurer of the safety of the Government's property or to be responsible for damage to the property caused by act of God.

That extreme degree of responsibility should not be read into the contract by inference.

The clause in question is susceptible to but one meaning, that of fixing the *period* of the contractor's responsibility but if it could possibly be susceptible of meaning that the contractor was an insurer, it should be construed as against the party who wrote the contract and in favor of the other party, the petitioner.

F[illegible] Ball, Jr.,
[illegible]*ney for Petitioner.*

January 1948

APPENDIX.

The pertinent provisions of the contract are as follows:

Article 9. (a) *Delays—Damages.* If the Contractor refuses or fails to prosecute the work, or any separable part thereof, with such diligence as will insure its completion within the time specified in article 1, or any extension thereof, or fails to complete said work within such time, the Government may, by written notice to the Contractor, terminate his right to proceed with the work or such part of the work as to which there has been delay. In such event the Government may take over the work and prosecute the same to completion, by contract or otherwise, and the Contractor and his sureties shall be liable to the Government for any excess cost occasioned the Government thereby. If the Contractor's right to proceed is so terminated, the Government may take possession of and utilize in completing the work such materials, appliances, and plant as may be on the site of the work and necessary therefor. If the Government does not terminate the right of the Contractor to proceed, the Contractor shall continue the work, in which event it will be impossible to determine the actual damages for the delay and in lieu thereof the Contractor shall pay to the Government as fixed, agreed, and liquidated damages for each calendar day of delay until the work is completed or accepted the amount as set forth in the specifications or accompanying papers and the Contractor and his sureties shall be liable for the amount thereof; Provided, That the right of the Contractor to proceed shall not be terminated or the Contractor charged with liquidated damages because of any delays in the completion of the work due to unforeseeable causes beyond the control and without the fault or negligence of the Contractor, including, but not restricted to acts of God, or of the public enemy, acts of the Government, acts of another contractor in the performance of a

contract with the Government, fires, floods, epidemics, quarantine restrictions, strikes, freight embargoes, and unusually severe weather or delays of subcontractors due to such causes, if the Contractor shall within ten days from the beginning of such delay (unless the Contracting Officer, with the approval of the head of the department or his duly authorized representative, shall grant a further period of time prior to the date of final settlement of the Contract) notify the Contracting Officer in writing of the causes of delay, who shall ascertain the facts and the extent of the delay and extend the time for completing the work when in his judgment the findings of fact justify such an extension, and his findings of fact thereon shall be final and conclusive on the parties hereto, subject only to appeal, within thirty days, by the Contractor to the head of the department concerned or his duly authorized representative, whose decision on such appeal as to the facts of delay and the extension of time for completing the work shall be final and conclusive on the parties hereto.

(b) The Contractor shall not be liable under this Contract for loss which is caused directly or indirectly by bombardment, invasion, civil war, insurrection, rebellion, revolution, military or usurped power or by operations of armed forces while engaged in hostilities (whether war be declared or not), or by civil commotion arising from any of the foregoing. In the event damage is occasioned by any of the foregoing causes, the Contractor shall, if so ordered by the Contracting Officer, repair such damage under a Change order stipulating the additional sum to be added to the contract price and the additional time for performance.

DIVISION DTH-1

REMOVAL OF EQUIPMENT AND APPURTENANCES

Sec. 3. *CONTRACTOR'S RESPONSIBILITY.*

1. The Contractor shall be responsible for all buildings, fixtures, equipment and appurtenances to be moved and re-erected, including any loss, breakage, or other damage thereto from date of Notice to Proceed until completion and acceptance of the project.